STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law ("ECL"), Article 12 of the Navigation Law, and Titles 6 and 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

- by -

2526 VALENTINE LLC,

Respondent.

RULING ON MOTION FOR RECONSIDERATION

DEC Case No. R2-20070604-242

Appearances of Counsel:

-- Alison H. Crocker, Deputy Commissioner and General Counsel (John K. Urda of counsel), for staff of the Department of Environmental Conservation

-- No appearance for respondent

RULING OF THE ADMINISTRATIVE LAW JUDGE ON MOTION FOR RECONSIDERATION

Staff of the Department of Environmental Conservation ("Department") moves for reconsideration of a prior ruling dated January 6, 2009, denying without prejudice staff's motion for a default judgment. For the reasons that follow, staff's motion for reconsideration is denied.

Proceedings

By motion dated March 18, 2008, Department staff moved for a default judgment on its September 17, 2007, complaint against respondent 2526 Valentine LLC. In its complaint, staff alleged violations of the Environmental Conservation Law ("ECL") and Navigation Law arising from an alleged petroleum discharge at a residential building located at 60 East 177th Street,

Bronx, New York, owned by respondent. Staff also alleged that respondent failed to register the petroleum bulk storage ("PBS") facility located in the East 177th Street building, as well as a PBS facility located in a building at 2526 Valentine Avenue, Bronx, New York, also owned by respondent.

Staff moved for the default judgment based upon respondent's failure to answer the complaint. In its motion, staff sought a civil penalty of $100,000 and an order requiring respondent to remediate the spill consistent with a Department approved work plan.

In my prior ruling, I denied Department staff's motion for a default judgment without prejudice (Ruling, Jan. 6, 2009, at 9). Because respondent had appeared at the pre-hearing conference and, thus, appeared in the proceeding, under Departmental authority, respondent was entitled to receive notice of the motion for a default judgment (see id. at 6).[1] However, on the motion, Department staff failed to establish that respondent had been served with the motion (see id.). Accordingly, I denied the motion without prejudice. I also went on to address other deficiencies in the complaint and staff's penalty analysis that required attention prior to any motion to renew or other proceedings in this matter (see id. at 6-9).

By motion dated January 13, 2009, Department staff now seeks reconsideration of the January 6, 2009, ruling. Attached to its motion, Department staff supplies proof of service of the March 2008 default judgment motion upon respondent (see Motion for Reconsideration, Exh A). Staff also withdraws those ECL violations I previously determined were not sufficiently stated in the complaint. Staff further proffers documentary evidence, in the form of a Departmental Spill Report Form for the April 23, 2007, spill alleged in the complaint, and PBS registration applications for the two facilities filed by respondent (see id., Exhs B, D and E), in support of its remaining causes of action. Staff also provides a revised penalty analysis supporting its request for the $100,000 civil penalty. Neither the proof of service of the motion, nor the other documents proffered on the motion for reconsideration, were provided on the original motion for a default judgment.

[1] The Commissioner has since directed that on all motions for a default judgment, Department staff must serve notice of the motion upon respondents and any known representatives (see Matter of Dudley, Decision and Order of the Commissioner, July 24, 2009, at 1-2).

Although the present motion for reconsideration was served upon respondent, respondent has not filed any papers in response to the motion.

Discussion

Department staff's motion is denominated a motion for "reconsideration." In Departmental proceedings, motions for reconsideration of prior rulings have generally been analyzed under the standards applicable to motions for leave to reargue pursuant to Civil Practice Law and Rules ("CPLR") § 2221(d) (see e.g. Matter of Pierce, Ruling of the Commissioner on Motion for Reconsideration, June 9, 1995, at 1 [citing Matter of Mayer v National Arts Club, 192 AD2d 863 (3d Dept 1993)]). Thus, a motion for reargument, or reconsideration in Departmental parlance, may be granted only upon a showing that the decision-maker overlooked or misapprehended the facts or law, or for some reason mistakenly arrived at the earlier ruling (see id.; Matter of Izzo, Ruling of the Administrative Law Judge on Motion for Reconsideraiton, March 28, 2006, at 2; CPLR 2221[d]).

Department staff does not argue that I misapprehended the facts or law when deciding the prior motion. Rather, Department staff offers new evidence not previously included on the motion for a default judgment. Specifically, staff provides proof of service upon respondent of its motion for a default judgment, in accordance with the directives contained in Commissioner orders (see e.g. Matter of Makhan Singh, Decision and Order of the Commissioner, March 19, 2004, at 2-3 [requiring service of a motion for default judgment upon a respondent who has appeared at a pre-hearing conference prior to defaulting in answering]). However, motions for reargument are decided based upon the papers submitted on the original motion, and not on matters of fact newly offered on the reargument motion (see Phillips v Village of Oriskany, 57 AD2d 110, 113 [4th Dept 1977]; CPLR 2221[d][2]). Thus, the newly proffered affidavit of service may not be considered and does not provide a basis for granting staff's motion for reargument.

Because the evidence staff provides on this motion was not previously presented, its motion might more properly be characterized as one to renew rather than to reargue (see Segall v Heyer, 161 AD2d 471, 473 [1st Dept 1990]; see also CPLR 2221[e]). However, on a motion to renew, which may be based upon facts known to the movant at the time of the original

motion, the movant must nevertheless provide a reasonable excuse for the failure to submit the addition evidence on the original motion (see Segall, 161 AD2d at 473; CPLR 2221[e][3]). Here, Department staff offers no excuse explaining why the affidavit of service was not included on the original motion for a default judgment. Thus, to the extent staff's motion for reconsideration is deemed to be a motion to renew, it must be denied.

Finally, were I to overlook the procedural obstacles facing this motion and consider the merits, which I do not, I am still troubled by the factual support offered for the Navigation Law charge. The newly offered spill report form supports the allegation that a spill occurring on April 23, 2007, at 1:51 P.M. was reported to the Department on that same day (see Motion for Reconsideration, Exh B). However, the spill report also reveals that the report was originally made by an unknown caller to the City's Department of Environmental Protection, which in turn, reported the spill to the Department. Moreover, staff counsel's affirmation confirms that when Department staff responded to the spill report, they were not permitted entry to the boiler room where the spill allegedly occurred. Thus, the sole evidence presented in support of the Navigation Law charge is double hearsay from an unknown source, and no Departmental representative has actually witnessed a spill at the facility or confirmed the need for remedial work.

I recognize that hearsay may form the basis of a Departmental order (see Matter of Tractor Supply Co., Decision and Order of the Commissioner, Aug. 8, 2008, at 2-3). However, without passing on whether the evidence proffered would be sufficient to support a prima facie showing of the Navigation Law charge, the evidence nevertheless provides a very thin record on which to base a Commissioner order. As I had indicated in my prior ruling (see Ruling, at 9), further investigation should be undertaken before staff proceeds in this case.

Ruling

Department staff's motion for reconsideration is denied.

_____/s/_____
James T. McClymonds
Chief Administrative Law Judge

Dated: March 10, 2010
Albany, New York